IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, Secretary of the Interior, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE FOR UTAH POWER & LIGHT COMPANY

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Utah Power & Light Company (Utah Power) respectfully submits this brief *amicus curiae* for consideration of the Court. Consents to the filing of this brief have been obtained from both Petitioners and Respondents and have been filed with the Clerk of this

Court. Utah Power supports the position of Petitioners and urges this Court to reverse the decision of the United States Court of Appeals for the District of Columbia Circuit and to remand the case with instructions to affirm the Judgment of the District Court.

THE INTEREST OF UTAH POWER & LIGHT COMPANY

Utah Power is engaged principally in the business of generating and selling electric energy in Utah, southeastern Idaho and southwestern Wyoming. The Company's service area in these three states covers 79,000 square miles, with a population of about 1,200,000. Coal is the predominant fuel source for Utah Power's generation of electric power, and its use is increasing. In 1974, coal was the fuel source for 88 percent of the Company's power generation, and in 1975 coal provided 92 percent of its fuel supply.

Utah Power burned approximately four million tons of coal in 1975. At the present time the Company has under construction in the State of Utah three electric generating facilities, one at Huntington and two at Emery. Each generating facility will have a capability of 400 megawatts and all three power plants will use coal as its fuel. The Company estimates that each of the three units will burn 1.2 million tons of coal annually when in full operation, or nearly as much coal for the three units under construction as was burned in 1975 by the Company at its existing facilities. The State of Utah, through the Utah Air Conservation Committee, has determined that the Company must utilize coal at all three new facilities that has a maximum sulfur content of 0.6 percent on the average, as one of the conditions for not requiring the

Company to install and operate sulfur removal equipment. Moreover, the Company also has in the advanced planning stages two generating facilities to be located in Wyoming, each of which will utilize coal as its fuel source. The Company estimates that each of the Wyoming units will burn 1.4 million tons of coal annually when in full operation.

In order to assure an adequate and reliable source of low sulfur coal, Utah Power obtained assignments of eight coal prospecting permits covering approximately 18,325 acres of land in Utah owned by the federal government. The eight coal prospecting permits were issued pursuant to Section 201(b) of the Mineral Leasing Act, 30 U.S.C. § 201(b). Exploration for coal pursuant to the permits took place in 1970 and 1971, preference right lease applications were filed in 1972, assigned to the Company in 1973 and are still pending at the Interior Department.

On July 17, 1974, the United States Geological Survey issued a memorandum to the State Director of the Bureau of Land Management (BLM) recommending that the BLM issue preference right leases to Utah Power covering the 18,325 acres of federal land, with the proviso that the Company be required to submit a mining plan that would include procedures for minimizing pollution and timely reclamation of surface disturbances caused by the underground mining that ultimately takes place on the leased lands.

The basis for the Geological Survey's recommendation that the preference right lease applications of Utah Power be granted was its determination that workable coal deposits "in commercial quantities"—the sole statutory prerequisite to lease issuance pursuant to section 201(b) of the Mineral Leasing Act—

were discovered on each of the eight prospecting permits assigned to Utah Power.

Now that Secretary Kleppe has publicly announced that "there is no need to continue the moratorium on new coal leasing which was established nearly four years ago," and since the Interior Department has issued its *Final Environmental Impact Statement: Proposed Coal Leasing Program* (hereinafter referred to as the Coal Leasing EIS), it is Utah Power's hope that the preference right leases to which it believes it is legally entitled will be issued promptly in order that a mining plan may be developed and an environmental impact statement with respect to such plan be prepared —the necessary prerequisites to opening the underground mine the Company contemplates.

The decision of the court below represents a serious threat to timely development of the low sulfur coal contained in federal lands that are the subject of Utah Power's pending preference right lease applications. If that decision is not reversed and the judgment of the District Court reinstated, the Company's ability to proceed with a mining plan covering some 18,000 acres and involving several hundred million tons of needed low sulfur coal—in the absence of some undefined, unnecessary "regional" impact statement and the attendant delays which the Government acknowledges would take place with such an approach—would be significantly hampered, if not altogether foreclosed. This threat is no less real, we submit, because the federal lands as to which Utah Power has discovered "commercial quantities" of coal are not within the so-called "Northern Great Plains," or the "Northern Great Plains Province." The court below stated that the "relevant geographic area for development still

seems somewhat uncertain" (App. A, 45A), and Judge MacKinnon, in dissent, pointed out "the clear possibility that other potential plaintiffs could seek an infinite progression of 'regional' statements covering 'regions' of their own choice, thus seriously disrupting any attempt by the federal [petitioners] to deal with the development of a critical national resource." (*id.*, 57 A, n.7).

Utah Power therefore has a direct interest in supporting the Petitioners' effort to obtain a reversal of the decision below. In so doing, Utah Power assumes that both the federal and private petitioners will deal in some detail with the significant legal issues presented and it will therefore seek to avoid burdening this Court with repetitive legal argument.

ARGUMENT

The decision of the court below is directly contrary to this Court's subsequently issued decision in *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975) (hereinafter cited as *"SCRAP II"*), that NEPA does not require an impact statement by a federal agency until "the time at which it makes a recommendation or report on a proposal for federal action." The decision is also at odds with this Court's recognition in *SCRAP II* of the appropriateness under NEPA of the federal petitioners' practice of considering environmental impacts of individual projects in statements that pertain to such projects rather than in an overall "regional" statement for some undefined region. The ruling of the court below also conflicts with decisions of other circuit courts of appeals upholding impact statements pertaining to a specific proposed project which had independent utility, even though part of a larger, more comprehensive program.

I. The Lower Court's Decision is Contrary to This Court's SCRAP II Decision.

In *SCRAP II*, this Court very clearly held that under NEPA, "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action" (422 U.S. at 320; emphasis is the Court's). Moreover, this Court specifically repudiated an earlier decision by the court below, *Calvert Cliffs Coordinating Committee* v. *Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), and two Second Circuit decisions which "read the requirement that the statement accompany the proposal through the existing agency review process differently" from the Court in *SCRAP II* (422 U.S. 321 n.20). The court below in *Calvert Cliffs* had interpreted NEPA to require that "environmental issues be considered at every important stage in the decision making process concerning a particular action," and it therefore ruled that the environmental impact statement must be considered during staff level proceedings before any recommendation, report or proposal by the agency itself for federal action upon such application. 449 F.2d at 1118. That interpretation of NEPA was heavily relied upon in the decision of the court below here (App. A, 42A-43A).

Of particular significance to the underlying issue here of the appropriateness of the federal petitioners' practice of analyzing environmental impacts of particular projects in statements that relate to such projects and not to so-called "regional" impacts is this Court's rejection in *SCRAP II* of the lower court's attempt to require the ICC to expand the scope of its impact statement. Holding that the ICC could properly limit the scope of its impact statement regarding a general rate increase to those environmental issues directly related to such general action, and consider in future proceedings directly related to specific commodities the environmental issues thus raised, this Court ruled that the lower court's contrary conclusion embodied "an entirely unwarranted intrusion into an apparently sensible decision by the ICC" (422 U.S. at 326). By the same token, it is far more "sensible," we submit, for the federal petitioners to consider the environmental impacts of a specific mining plan, such as, for example, Utah Power's plan for underground mining of low sulfur coal on federal lands in southern Utah, than to attempt some broad, sweeping "regional" approach that would embody different kinds of coal, mined by different methods (surface) in a different part of the State or "region," on the totally unsupportable premise that such an approach is either legally required or practically illuminating.

II. The Lower Court's Decision With Respect to the Required Scope of an Environmental Impact Statement Conflicts With Decisions of Other Courts of Appeals.

The court below refused to follow decisions of other circuits, *e.g.*, *Sierra Club* v. *Stamm*, 507 F.2d 788 (10th Cir. 1974); *Trout Unlimited* v. *Morton*, 509 F.2d 1276 (9th Cir. 1974); and *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275 (9th Cir. 1973), which have upheld impact statements limited to a particular proposed action acknowledged to be part of a more comprehensive program because the particular proposal had independent utility so that approval did not represent a commitment on the part of the federal government to the more comprehensive project. Utah Power thinks it clear that those decisions are correct and that

subsequent decisions of like import such as *Nucleus of Chicago Homeowners Ass'n* v. *Lynn,* 524 F.2d 225 (7th Cir. 1975), *cert. pending,* No. 75-951, *Trinity Episcopal School Corporation* v. *Romney,* 523 F.2d 88, 95 (2d Cir. 1975), are likewise in harmony with the requirements of NEPA. Because we assume that the petitioners will deal extensively with this aspect of the issues before the Court, we will not do so. The weight of authority makes it clear that "regional" impact statements are not required by NEPA and we urge this Court to once again make the point so that the federal petitioners may proceed to permit the developmen of critically needed coal resources on a specific mining plan/environmental impact statement basis without further unnecessary delay.

CONCLUSION

For the foregoing reasons, Utah Power & Light Company, as *amicus curiae,* urges the Court to reverse the decision of the court below and to remand the case with instructions to affirm the Judgment of the District Court.

Respectfully submitted,

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